In the Supreme Court of the Hawaiian Islands.

June Term, 1896.

P. H. Kahau and Kapela Kahau, his wife,
v.
C. W. Booth, Trustee for Elizabeth K. Booth (nee Baker), legatee and devisee under the will of Malie Kahai.

Before Judd, C. J., Frear and Whiting, JJ.

A conveyance of land absolute on its face, a defeasance in writing having been given at the same time by the grantee to the grantors, constitutes a mortgage.

The defeasance which is essential to convert an absolute deed into a mortgage may be made by a separate instrument. This method is looked upon disfavor by courts. In this case the parol evidence alone was sufficient to sustain the bill to redeem.

OPINION OF THE COURT, BY JUDD, C. J.

This is a clear case. In September, 1883, the complainant, P. H. Kahau, wishing to borrow some money, applied to an attorney, J. K. Kaulia, and offered to give a mortgage on his wife's premises on Queen Street, Honolulu, worth from $800 to $1000, to secure a loan of one hundred dollars. The attorney agreed to lend the money of his client Malie Kahai, now deceased, whose devisee and legatee the defendant Mrs. Booth now is. The attorney advised complainant to give his client an absolute deed for the premises as being less expensive than a mortgage and promised that his client would give him a paper back stating that if the complainants paid the money back in one year, she would convey the land to them. After considerable demurring on the part of both Kahau and his wife and, on being assured by the attorney, Malie Kahai being present and agreeing thereto, that the two papers would be in fact a mortgage, an absolute deed was made by the complainants to Malie Kahai on the 20th September, 1883. The consideration expressed was $125, the $25, being interest on $100 for one year at the rate of 2½ per cent. per month, being retained in advance and made a part of the consideration. At the same time Malie Kahai executed and delivered to complainants a paper translated as follows:

To Kahau and Kapela Kahau,

Aloha to you two.

I hereby declare to you two, in accordance with your request to me that if you two shall repay to me one hundred and twenty-five dollars on the 20th September, A. D. 1884, or before such date, I agree to resell my land situated on Queen street, Honolulu, Oahu, whose size is 47-7x48-3 feet, which you sold to me by the deed made on this 20th September, 1883. And the expenses of such sale shall be borne by you.

Respectfully,
(Sig.) Malie Kahai.

In presence of
(Sig.) J. K. Kaulia.
Honolulu, Sept. 20, 1883.

None of these facts are questioned. The defendant Booth, trustee, after the death of Malie Kahai (his wife succeeding to her interest) took the ground that an absolute title had passed and brought proceedings in ejectment against complainants, whereupon a bill was filed to declare the deed a mortgage and to redeem the same. The Circuit Judge after hearing decreed that the transaction was a mortgage and that complainants were entitled to redeem.

We hold that the instrument made by Malie Kahai was a defeasance.

By all the authorities a defeasance is an essential requisite of a mortgage, and it may be (1) in the conveyance itself, or (2) in a separate writing, or (3) it may exist in parole merely. The second method was adopted by the parties and the transaction was fully understood and accepted by the complainants, the mortgagee Malie Kahai and her attorney.

In law the absolute deed and the separate defeasance or agreement to reconvey executed at the same time amount to a mortgage.

Pennsylvania courts hold that where the "conveyance and the agreement to reconvey on payment of the purchase money are on their face of even date (which is this case) the transaction is necessarily a mortgage and that parole evidence of a different understanding by the parties will not be received to convert it into a conditional sale." Kerr v. Gilmore, 6 Watts (Pa.) 405. Brown v. Nickle, 6 Pa. St. 496. But while it is not necessary in this case to go as far as this, it seems to us that it was prima facie a mortgage and it was hardly necessary for the complainants to show by parole that they were persuaded by the mortgagee to take the defeasance by a separate instrument on her assurance that she considered it a mortgage. But proofs were adduced before the Circuit Judge and they showed that the grantors continued in possession, that the consideration was inadequate, the land being worth many times more than the amount of money paid, that interest was charged, and that the full understanding of both parties was that the transaction was intended to be a mortgage and not a conditional sale. These facts would be sufficient to establish a defeasance by parole if the defeasance was not in writing. Campbell v. Dearborn, 109 Mass. 130. It made no difference that the time of repayment had been allowed to pass. Once a mortgage always a mortgage, and the mortgagor is allowed to redeem. Bayley v. Bayley, Admr. 5 Gray, 512. We remark that courts look with disfavor upon the method of making the defeasance by a separate instrument. It is liable to be used to the prejudice of the mortgagor (as in this case). Lord Chancellor Talbot said "they always appear with a face of fraud." Cotterell v. Purchase Cas. Temp. Talbot, 61, cited in 1 Jones, Mortgages, Sec. 243, and also Baker v. Wind, 1 Ves. Sr. 160. We should discourage the practice.

Cases on this subject may be found cited in Jones, Mortgages, Secs. 241 to 256.

The decree appealed from is affirmed with costs.

J. M. Monsarrat for complainant; Magoon & Edings for respondent.

Honolulu, July 9, 1896.

In the Supreme Court of the Hawaiian Islands.

June Term, 1896.

C. Bosse, Assignee in Bankruptcy of J. A. Affonso
v.
Manoel Branco and J. A. Affonso.

Before Judd, C. J., Frear, J., and Circuit Judge Perry sitting in place of Mr. Justice Whiting, disqualified.

Appeal from a Circuit Judge of the First Circuit.

A mortgage was made, recorded and delivered to an antecedent creditor by a person who soon after became bankrupt. The mortgagee had no reasonable cause to believe his mortgagor to be insolvent or bankrupt, or to be contemplating insolvency or bankruptcy, and was a *bona fide* purchaser for a good consideration;

Held: the conveyance was good as against the assignee in bankruptcy.

OPINION OF THE COURT, BY JUDD, C. J.

This is a bill in equity brought by the assignee in bankruptcy of one J. A. Affonso to cancel a mortgage of land which is situated in Honokaa, Hawaii, held by the bankrupt under Royal Patent (Grant) Number 1073 and known as the "Affonso Store Premises." The mortgage was given to one Manoel Branco under the following circumstances. Mr. Affonso, being a Portuguese store keeper at Honokaa doing quite a large business and having begun a coffee plantation, desired to borrow some money for his business. He learned through a mutual friend that one Manoel Branco, also a Portuguese, living at Laupahoehoe, some twenty miles distant, had some money to lend, and with this friend proceeded there and borrowed the money, $400, giving his receipt therefor, promising to secure its payment by a mortgage on his store premises at Honokaa as soon as he could get some person to draft the papers. Meanwhile he deposited his title deeds with Mr. Branco and went back to his home. This was on the 12 August, 1893. Affonso was then doing a good business; his credit was good and his principal creditor at Honolulu, Messrs. H. Hackfeld & Co., considered him one of the most responsible country store keepers.

Affonso agreed to pay 8 per cent. per annum interest on the $400 every six months, but Branco preferred to leave it to be paid at the end of two years when the principal would be due. After a while business became dull and Affonso, though he had reduced his debt to H. Hackfeld & Co. from $5000 to about $2000, made less frequent remittances to them, being unable himself to collect promptly the debts owing him by plantation hands and homesteaders.

Affonso says that he was also embarrassed by having bought out a partner in another store in Hamakua, and that he sold his coffee plantation to pay debts with the proceeds at a loss of $1000. In the latter part of 1894 he was pushed by H. Hackfeld & Co. for payment of the balance of his debt to them; a suit and execution were threatened and he was advised to go into bankruptcy by an employee of this creditor. He went into bankruptcy on December 31, 1894. Not long before this he employed an attorney and notary to draft the mortgage in question to Branco to secure the sum he had borrowed, had it dated the 12th of August, 1893, the date of the loan, acknowledged it on the 22d November, 1894, and had it recorded and then delivered it to Branco. Branco says he had no notice of Affonso's insolvency nor any reasonable grounds for believing him to be so. Affonso says he never gave Branco any reason to think he was insolvent. This testimony is not disputed.

It appears to us that the conveyance was made to a bona fide purchaser for value, Branco, who had no reasonable cause to believe his mortgagor to be insolvent or bankrupt or to be in contemplation of insolvency or bankruptcy. The statutory exception is complied with. See Chap. 35, Sec. 14, Laws of 1884. It may be that Affonso, finding that he was liable to be forced into bankruptcy wished to prefer his fellow countryman and save him from loss by taking all these steps to secure him, but Branco, his creditor, had no knowledge of these circumstances. The conveyance was to secure a bona fide debt and was not a voluntary conveyance, though Affonso was not pressed to make it by Branco, who felt himself safe and had no cause to suspect that he was not secure. It was executed and delivered in fulfillment of the promise made at the time of the loan, to wit, in August, 1893.

Assuming that the mortgage, though dated August 12, 1893, created no lien on the property from that date and that the deposit of the title deeds created no lien, and treating the conveyance as made on the 22d November, 1894, and establishing the lien only from that date, Branco was, by all the evidence, a bona fide purchaser within the exception of the statute. Even if Affonso made a fraudulent preference by the conveyance, Branco did not participate in it, nor was he aware that such preference was thereby accomplished. The evidence even shows, it seems to us, that he had at the time of the delivery of the mortgage every reason to believe that Affonso's financial condition was sound, and therefore his mortgage is good as against the complainant in this case.

The decree appealed from is reversed and the bill dismissed with costs.

L. A. Dickey for complainant; L. A. Thurston for defendants.

Honolulu, July 9, 1896.

In the Supreme Court of the Hawaiian Islands.

June Term, 1896.

James J. Byrne
v.
John Allen, Henry Allen, Henry Rhodes and W. H. Lambert, partners under the name of the Fort Angeles Red Cedar Shingle and Lumber Company, Defendants, and A. Feek, Garnishee.

Before Judd, C. J., Frear, J., and Circuit Judge Perry in place of Whiting, J., disqualified.

A decision of the court, jury waived, like the verdict of a jury, is to be supported unless error is clearly shown; and bills of exception are to be taken most strongly against those making them.

It cannot be inferred that the trial court, jury waived, overlooked an issue of fact, where it has made a general finding which can be sustained by the evidence, although it has not expressly referred to the issue in question and has expressly referred to other issues, the record not showing otherwise that the court did in fact overlook the issue.

OPINION OF THE COURT, BY FREAR, J.

This case came here on two bills of exceptions, in passing upon which, the Court, among other rulings, ordered a new trial upon one branch of the case on the ground that a material issue of fact, relating to plaintiff's status as a domestic creditor or otherwise, had been overlooked by the trial court. (See decisions of June 25, 1896.) Plaintiff's counsel thereupon contended that the point, whether the issue in question had been overlooked by the trial court, had not been raised or argued in this court and that therefore he was entitled to be heard upon that point under the provisions of Section 57 of the Act to Reorganize the Judiciary Department. We think this contention correct, although we must confess that it was difficult to say from the record and arguments of counsel precisely what questions were to be regarded as submitted for the consideration of the court. Having now heard counsel on both sides upon this point, we are of the opinion that the record is such as not to sustain the inference that the issue in question was overlooked by the trial court. It is true no express finding was made thereon and express findings and rulings were made upon other specific points, besides the general finding for the plaintiff. But a decision of the court, jury waived, is of the nature of a jury verdict and must be supported unless error is clearly shown, and bills of exceptions, like pleadings or conveyances, are to be taken most strongly against those making them. In this instance the express specific findings and rulings were correct and there was a general finding for the plaintiff which can be sustained by the evidence. The exceptions taken must be considered as raising the question whether the general finding was contrary to the law and the evidence rather than the question whether the trial court failed to consider the issue in question at all. Whether he did in fact consider it though not expressly referring to it, or whether he considered it waived in view of the fact that no attempt was made to meet the plaintiff's affidavit relating thereto, there being already against this only the unsworn allegation relating thereto in the receiver's petition, or whether the issue was in fact overlooked, we cannot say from the record. We can only say that it is not clearly shown by the record that the issue was overlooked and the exceptions do not clearly raise the question.

The order for a new trial upon this phase of the case is reversed; and we are informed that the plaintiff has remitted the sum named by the court to be remitted as a condition for avoiding a new trial on the other branch of the case, thus making any new trial at all unnecessary.

A. S. Hartwell for plaintiff; L. A. Dickey for receiver and garnishee.

Honolulu, July 9, 1896.